Overstreet, Greg (ATG)

From: Wiitala, Kristal

Sent: Thursday, January 12, 2006 11:17 PM

To: ATG WWW Public Records Requests

Cc: Overstreet, Greg (ATG); McNamara, Sherry

Please find comments attached. Thank you for your consideration.

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STATE OF WASHINGTON

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

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January 12, 2006

To: Greg Overstreet, Office of the Attorney General
From: Kristal K. Wiitala, DSHS Public Records/Privacy Officer
Subject: Comments on Proposed Chapter 44-14 WAC
Public Records Act – Model Rules

We appreciate the leadership and effort involved in this impressive body of work, including all the effort to outreach to the public to hear their concerns. There are many positive steps included in the proposed rules. However, we have identified some concerns with the rules as published. Public disclosure coordinators across DSHS, including nonattorneys, have reviewed the proposed rules and the below compiles our comments.

Overall Comments:

Use of Comments:

It is highly unusual to have comments promulgated with rules. If comments are adopted as part of the rule chapter, it appears the argument can be made that they have the force of rules and would not be just suggested interpretations despite the advisory language included in the rules. Placing them in one package makes it very difficult to navigate, read, and track and more cumbersome to amend if court decisions or laws change.

It is confusing to assign these comment sections proposed WAC numbers. It could require the AGO to withdraw the "comment" WAC sections before adopting the permanent rules, and explain this withdrawal when adopting the permanent rules. Suggestions for displaying the comments more clearly outside the proposed rule text include:

- Place all the comments in an Attachment or Exhibit that would be filed with the proposed rules and be published in the Washington State Register;

- Create an Appendix numbered as a single WAC section placed at the end of the model rules; or

- Promulgate the comments as an interpretative statement or publish as an article or opinion on the AGO website.

Comments also will not bind requestors so any language that affects requestors and their actions needs to be in rule format. Most of the comments are directed to agency staff and thus would be better adopted as agency policies or procedures. Additionally, the comments, although labeled as opinion, may not be clear in application that they present a nonbinding opinion and not the law in areas where issues are unsettled.

Clarity of language:

Clear rule-writing and plain talk principles would help persons understand and comply with these rules. The style of these rules reads more like a legal brief and appears designed to be understood and applied by lawyers. Many agency employees who handle public disclosure requests are not attorneys. Even experienced public disclosure staff had difficulty following and reading through all of the rules and comments, especially due to the length and the difficulty of finding the actual rules.

Rules are generally intended to affect individuals outside of an agency. Most requestors in DSHS are not attorneys and a very large percentage of people seeking records are clients who may have limited English and lower grade level reading skills. The rules are not written in clear

simple English so that almost anyone can understand as needed to be user friendly. If DSHS were to consider adoption of the model rules, staff would have to significantly revise and rewrite the language to meet our usability standards.

The language is very dense and it is difficult to locate applicable sections. The sentences are lengthy. Legalese and passive voice is contained throughout the rules and they use uncommon vocabulary different from the Public Records Act (PRA). Terms like "shall" are used that are outside current statutory and rule-writing recommendations. The rules do not use Q&A format that is helpful in clarifying complex issues. For ease of reference and reading, subsections should be limited to one paragraph. It is also unusual and affects readability to have footnotes and court citations in rules. The use of quotes around important phrases, like "fullest assistance," is also unique and disrupts the readability of these sections.

References to RCW Ch. 42.17:
The purpose of rules is to implement, clarify and expand upon statutory language, not merely repeat or quote it. Agencies do not have to adopt provisions by rule that are already in statute, different that what is stated in 44-14-020001. The rules may refer to statutes but it is not helpful to persons seeking the agency's practices to provide quotes of unclear and wordy statutes. The rules should 'stand alone' - but instead these rules repeat, quote and even partially quote other WAC and RCW, at times without attribution.

Additionally, because the new chapter 42.56 goes into effect in only a few months and the new citations are readily available, it would be helpful to have the citations in place in these model rules now. Due to the length of time needed for the rule-making process by each agency, the new statutes will probably be in effect by the time any other agency adopts these rules.

It is not necessary to refer to statutes by year by including (2005) after statutes that were amended last year: these statutes are currently the law and principles of construction require that the references be interpreted as those laws currently in effect. If some of these same laws are amended in 2006, and when these laws are replaced by Ch. 42.56 RCW, the references will be immediately outdated. The normal interpretation is to infer that revisions would be incorporated ("as now or hereafter amended") but the reference to 2005 would limit the rules to those laws, which would lead to difficulties in resolving any conflicts with the statutes.

Definitions:
It would be helpful to have definitions for the terms used in these rules that are not already defined in the Public Records Act. Terms such as "public records officer," "requestor" and "access" that are used or defined within the rules or comments should be defined in a separate section in the rules, making them easier to locate and understand.

Specific Comments by WAC Section:

00005: While the training of all staff on public disclosure and record retention is permissive (and desirable), adopting this policy as a semi-rule may set a standard that is difficult and costly to meet in large agencies where these duties are assigned to more specialized staff.

00006: The reference to 22 chapters in the Administrative Law Section Deskbook seems a bit too specific to list before the publication has even been edited by the publisher. Stating that it is "available" on the WSBA website may mislead the public who would think it would be free of charge – maybe add "available for purchase."

010(1): There is danger in paraphrasing as well as quoting from the RCW. The requirement in RCW 42.17.260(2) is that the agency keep a list of laws other than those in the PRA that "it believes" exempts or prohibits disclosure of that agency's records. Agencies are not required to list every possible exemption law in addition to the PRA. This subsection does not really fit as "Authority and Purpose" of the WAC, does not add to the RCW, is generally covered elsewhere, and could be deleted.

020(2) [(first subsection (2): The contact to the central PRO should be permissive, not recommended – therefore rule should be "may contact." In an agency like DSHS with many field offices, directing that requestors should contact the centrally designated PRO can cause delays and may unnecessarily complicate the hundreds of requests that are currently processed routinely at local offices.

020(2) [(second subsection (2)]: "Another staff member may process the request" - DSHS processes so many public disclosure requests and some are so large that a series of individuals coordinate requests and often many employees are involved in gathering, locating, copying, or redacting records to process a request. More generic terminology is needed in this rule and in other similar sections to clarify that public records disclosure may not be a single person operation and can be delegated. This concept is stated in 02002 and should be reflected elsewhere in the rules and comments.

02001: The prohibition against an agency invoking a procedure should be clarified. The agency may not require the public or someone outside the agency to do something unless that procedure is published or adopted with the force of a rule. An agency may still adopt internal administrative policies and procedures affecting only its own staff under its own procedures without formal publication to the general public.

030(4)(d): It would be more customer-friendly and more in line with actual practice if it was stated that the request for records form was available at any office of the agency.

03001(3): Language requiring the agency to recover documents it has ever used as a routine matter imposes significant administrative difficulties and may go beyond the obligation imposed in the PUD case. Unless some exception is recognized, the comment as written may mandate that agencies retrieve documents that have been permanently archived with the Secretary of State. Under current practice, agencies give up ownership of these records and public disclosure requests are referred to that agency. Under the way this section is worded, an agency may have to search those archives to respond to a records request as those records were certainly "used" by an agency at one time. Records are not sent to State Archives to avoid disclosure but under record retention policies. With regard to the home computer usage, these statements are procedural recommendations that are opinion not necessarily supported by court precedent that appear out of place in rule or adopted as a public comment.

03005: The second paragraph appears to be outside the scope of authority of the AGO and should be addressed by the Office of the Secretary of State under its authority, which it does already in Appendix C to the State Records Retention Schedule.

03006: First paragraph: Because procedures applying to requestors are appropriate subjects for rules, the ability to make a request other than in writing should be in the rule. Ability to make verbal requests is a standard and accepted interpretation of the PRA which is silent on this

issue so it would be helpful to recognize this ability in rule, which as written seems to imply that written requests are the norm. Also, there are some areas where a statute requires a request to be in writing and this exception should be noted in the comments. It also may be helpful for this section to recognize the potential need to accommodate and assist persons with sensory impairments, limited-English skills, illiteracy, or other recognized limitations to complete requests.

The benefits of having an email address for a requestor should be balanced with the problems that may arise and lack of security when transmitting information needed for processing requests over the internet that may contain confidential information about a requestor or subject of a request. For example, social security numbers or other client identifiers plus confidential client information may be used in processing a request for public assistance clients or their authorized representatives. Also, email is not by itself a permanent record but needs to be printed or otherwise maintained to create a retainable record. In the next to last paragraph, it should be recognized that the statue also permits an agency to ask for verification of identity if records can only be disclosed to certain individuals and are otherwise confidential. For example, the HIPAA privacy rule requires agencies to obtain documentation of identity or position when disclosing health care records.

040(2): This rule fails to recognize another option for response allowed by RCW 42.17.320 within five days, which is to deny a request. An initial denial may occur for instance when a request is made to the incorrect agency or an individual is seeking confidential records on another party and has no legal right or authorization to obtain that information.

040(4): In order to provide the optional notice, it is not necessary that the information be exempt from disclosure, only that an agency believe that the information is sufficiently sensitive that the party who is identified in the request may want to be notified in advance of third party receipt of that record. The first sentence in this subsection should use "or" instead of "and." Also, statutes or contracts may require a party be notified of the intended disclosure, whether or not the information is considered to be confidential. For example, the state Collective Bargaining Agreements requires that member employees be notified by an agency of any public disclosure request seven days before release of information from their personnel or payroll files.

040(9): The statement about completing a diligent search would be more appropriate in the billing letter or at the time the records are stated to be ready for inspection, not in the closing letter, especially if the request has been abandoned.

040(10): The logistics of this subsection as worded could impose significant administrative burdens and the potential of increased liability of agencies. Under this language, the agency may be come responsible to supplement a response if any one locates additional documents regardless of whether that person is aware of the public disclosure request. The last clause requiring a written explanation of why the records were not previously located may not be known to the responder and could be used as an admission against the agency that should not be mandated as this duty is not imposed by the PRA. The language in 04007 should be substituted as it is permissive and less likely to create liability.

04002(1): Because this language affects individuals outside the agency, some of the obligations and duties imposed on requestors should be included in rule, not comment. However, the language should be clear to recognize that many requestors are not sophisticated and may not read the rules so should recognize flexibility in imposing these as requirements.

04002(2): Clarification is not always necessary with a "relating to" request as the agency can do its job to locate those records identified in a reasonable search.

04003(1): Again, this provision should recognize the need to verify identification of those who have a special right to confidential records that the general public would not have.

04003(5): As stated above, the agency also has the ability to deny a request for records within five days under RCW 42.17.320 when appropriate. The comment also goes too far in imposing potential liability by stating a standard response time estimate is "almost never reasonable." In large agencies that receive many requests, it is possible to come up with a standard estimate of time for certain classes of requests. For example, in DSHS, we receive hundreds of requests for all of a person's client records. It would be extremely time consuming and take time away from processing records request if an individualized estimate of time had to be made in each instance. Also, often persons receiving and responding to a request may not have the records and not know where they are located across the agency or state and thus needs to use a placeholder time estimate in order to respond within five days. If the records can be produced sooner, they will be but if it takes longer, an extension of time will be requested.

04003(10): In the last paragraph, providing information about recommended procedures in filing a lawsuit could be interpreted as providing legal advice to the public. These procedures would be better placed in court rule or in statutory clarification of RCW 42.17.330.

05004(4) [it appears this section should be numbered 04004]: The title "failure to provide records" is inaccurate if an agency does not have a record as it implies that the agency did not satisfy its obligation to provide records. The reference to an agency that holds a record appears to be a limitation on and is confusing when considered with the earlier provision that the agency must go out and produce records it once used but no longer holds. In section (b)(i), secure redactions may be made on an electronic record through electronic blocking out and then printing the document but the record cannot be provided electronically due to the current general insecurity of permanent removal of electronic information. The footnote to (b)(ii) is incomplete as there are many kinds of records exempt in their entirety from public disclosure (see, e.g., RCW 13.50.100, 74.34.095, 50.13.020 and many other laws that exempt client or personal information).

04005(2): Recognition of the special accommodation needs of some requestors should be included.

04006(3): The retention of public disclosure requests and responses is governed by the State Records Retention Schedule or agency-specific schedules and is not the same as "documents with legal value."

04007: This language should be substituted for that in the WAC section 040(10).

050: This language is helpful. It does not change current DSHS practice or interpretation of the "creating records" provision as it applies to databases, although DSHS does perform simple queries within databases to pull fields without charging under RCW 43.105.280. If a request is more complicated, this section would support offering that option. In subsection (3)(c)(vii), reference should be made generically to "other laws that may apply" to require safeguards. In DSHS, HIPAA security and privacy standards apply, for example. It is helpful to have these

specific considerations listed that an agency can cite to in explaining why electronic access cannot be granted.

05001: Consideration should be given to licensing restrictions that may not permit others to view or use the software or for data that can not readily be printed. The two options may not be available so the qualifier should be inserted that "the agency generally may have two options." This possibility is recognized in 05002(2). The act treats "electronic" records exactly the same as any other record. Unless exempt, agencies must make electronic records available just like any other record.

060 and 06001: These sections should be clarified to reflect that the agency's obligations to list exemptions under RCW 42.17.260(2) only extends to those that may apply to that agency's records.

6002(1): The reference to (ggg) is incorrect. Until January 1, 2006, RCW 42.17.310(1) went until (hhh) and as of this time, it ends at (iii) as codified by the Code Reviser after the 2005 section.

6002(7): It seems it would be clearer if the references in this section were to the "holder of the potential trade secret," not to the "potential holder." The agency actually holds what could be claimed as a trade secret.

070(1), third paragraph: It appears that RCW 42.17.300 allows an agency to charge the ten percent deposit before processing the request if it can estimate the number of records involved. Locating and assembling all the records if a requestor is not serious for a very large request would be a misuse of public employee staff time. Once the deposit is paid, the agency can start processing, then charge for the remaining cost of copies or installments before providing the records.

070(3): This provision does not mention the costs of shipping containers, which is mentioned in the 07001(7) and should be included in the rule to provide notice of this potential (but probably unlikely) charge.

070(4): Fiscal requirements may not allow a check to be made to out to an individual but should be payable to the agency. Money orders should be allowed for persons without bank accounts.

07001(1): A caveat should be included "unless otherwise provided by law." The state Health Care Information Act in RCW 70.02.010(14) allows covered agencies (such as public hospitals) to charge searching and editing fees. The HIPAA privacy rule preempts to prevent this charge to the subject of the records or that person's representative in 45 CFR 164.524(c)(4) but can charge third parties.

07001(2): It would be helpful to clarify that costs can be per side of double sided printed paper as charges are per page, not per piece of paper, in order to encourage less use of paper. 07001(3): An agency may also prove actual costs by providing a copy of an invoice from a vendor to show actual copying charges for nonstandard copies.

07005: Agencies may waive charges for any reason they want as the requirement to charge is permissive, such as providing records to clients or when it helps the agency administer its program.

080(1): Directing that the petition should go to the agency public records officer will delay processing this request. In DSHS, there are appeals officers designated for the various public records officers located in local offices and coordinators for divisions or administrations. The DSHS public records officer is not the appeals officer for all responders. The final response letter provides the name of the individual designated to handle petitions for review of a denial of records and indicates the petition should be sent to that person. If not, it is forwarded as soon as possible.

080(2): The interpretation we have followed of the internal review procedure in RCW 42.17.320 is that a response must be made within two business days of receipt of the appeal of denial. The response can indicate if additional time is needed to review the denial. It nearly always is necessary as to obtain the records, review the redactions and determine whether they were correct can realistically not be completed in two days, particularly where a request may involve boxes of documents or hundreds of pages to be reviewed. To have a meaningful review of a denial of records, the documents and the basis for the redactions should be carefully scrutinized.

080(4): Requestors do not have to go through the internal review process and need not wait until it is completed before seeking judicial review. If the requestor does not formally ask for internal review, the decision is deemed final after two days so the only apparent minimum time for seeking review is two days so the reference to "whichever comes first" is not correct. See 08004 which more correctly states the time frames.

08001: The review by the public records officer's supervisor would only be appropriate if the PRO made the final agency response and redacted the records. For the many other instances whether other public records staff responded to requests, someone else may be designated as an appeals officer. With large requests, mistakes can happen so that a thorough review may be appropriate.

08003: It would be preferable to have ADR language in rule.

08004(3): While the comment states that the judicial review process is simple for a pro se, persons who seek judicial review and have limited or no familiarity with the courts have no idea how to proceed or how to draft or find a form. These are not standard forms that are available at the courthouse or readily through self-help mechanisms. Agencies cannot tell a person how to file such a motion without infringing on providing legal advice. It would be helpful to have a reference to a resource to find these forms or provide samples.

08004(6): The provisions of this subsection appear to be more in the line of court rules instead of executive branch.

08004(7): The term "vindicating" is somewhat overblown for an action by an individual requestor.